(2)

No. 88-268

Supreme Court, U.S.
FILED
SEP 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1988

JAMES A. WILLIAMS,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

## BRIEF IN OPPOSITION FOR THE RESPONDENT

DENNIS R. DUNN
Assistant Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

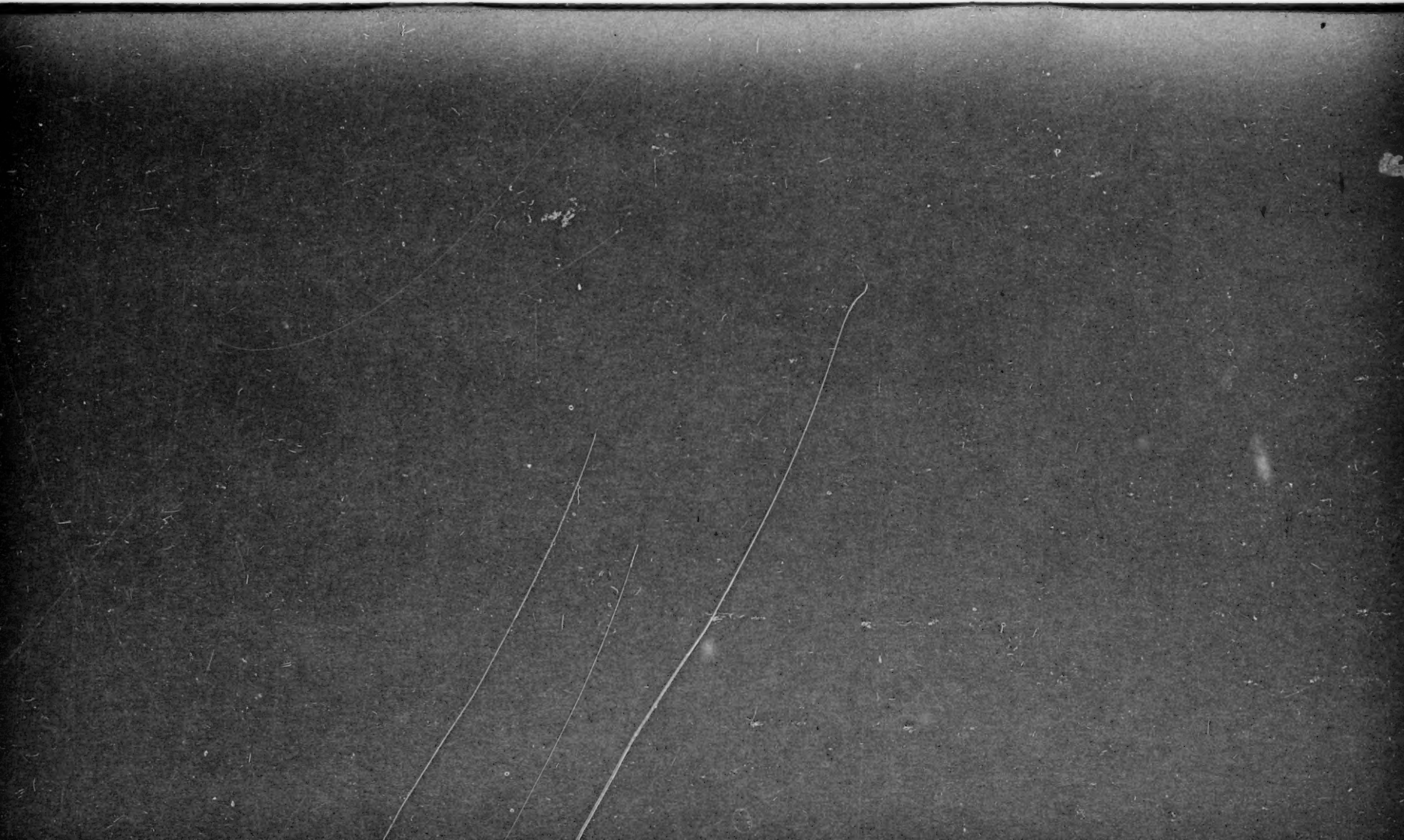
MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831



## QUESTIONS PRESENTED

A.

Whether this Court should grant a writ of certiorari to review whether the Supreme Court of Georgia correctly determined that a retrial of the Petitioner is not barred by the Double Jeopardy Clause of the Fifth Amendment?

B.

Whether this Court should grant a writ of certiorari to review the decision of the Supreme Court of Georgia, not based upon federal constitutional law, that the prosecutor in the Petitioner's case is not disqualified from participating in the Petitioner's retrial?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

REASONS FOR NOT GRANTING THE WRIT ..... 4

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT PETITIONER'S RETRIAL WOULD NOT BE BARRED BY THE DOUBLE JEOPARDY CLAUSE ..... 4

B. NO FEDERAL QUESTION IS PRESENTED FOR REVIEW REGARDING PETITIONER'S CLAIM OF DISQUALIFICATION OF THE PROSECUTOR ..... 10

CONCLUSION ..... 12

# TABLE OF AUTHORITIES

Page(s)

CASES CITED:

*Arizona v. Washington*, 434 U.S. 497 (1978) ..... 9

*Berea College v. Kentucky*, 211 U.S. 45 (1908) ..... 11

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... 6

*Burks v. United States*, 437 U.S. 1 (1978) ..... 9

*Fox Film Corporation v. Muller*, 296 U.S. 207 (1935) ..... 11

*Herb v. Pitcairn*, 324 U.S. 117 (1945) ..... 11

*Jackson v. Virginia*, 443 U.S. 307 (1979) ..... 8

*Oregon v. Kennedy*, 456 U.S. 667 (1982) ..... 9

*Williams v. State*, 250 Ga. 463, 298 S.E.2d 492 (1983) ..... 1, 3, 5

*Williams v. State*, 254 Ga. 508, 330 S.E.2d 353 (1985) ..... 2, 5, 8

*Williams v. State*, 258 Ga. 305, ___ S.E.2d ___ (1988) ..... *passim*

*Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977) ..... 11

No. 88-268

In The

# Supreme Court of the United States

October Term, 1988

JAMES A. WILLIAMS,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

## BRIEF IN OPPOSITION FOR THE RESPONDENT

## STATEMENT OF THE CASE

### A. Course of the Proceedings.

The instant proceeding is a request for a writ of certiorari arising from an opinion of the Supreme Court of Georgia denying the Petitioner's motion to prevent his retrial in the Superior Court of Chatham County, Georgia, for the offense of murder. *Williams v. State*, 258 Ga. 305, ___S.E.2d ___ (1988). The Supreme Court of Georgia had twice before reversed the Petitioner's Chatham County, Georgia, conviction for murder. *Williams v. State*, 250 Ga.

463, 298 S.E.2d 492 (1983); *Williams v. State*, 254 Ga. 508, 330 S.E.2d 353 (1985). After his third retrial had ended in a mistrial when the jury deadlocked eleven to one for the Petitioner's conviction, the Petitioner claimed that a fourth retrial would amount to Double Jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and that the prosecutor in this case should be disqualified from the retrial. *Williams v. State*, 258 Ga. at 306. These are the issues now presented to this Court for review.

**B. Statement of Facts.**

The Supreme Court of Georgia on its third review of the Petitioner's case summarized the facts underlying the Petitioner's conviction as follows:

> The victim, Danny Hansford, was a frequent house guest of the appellant [the Petitioner], and the two of them engaged in a homosexual relationship.
>
> The victim had an explosive temper, and on April 3, 1981 (approximately one month prior to the victim's death), the appellant testified that the victim went into a drug-and-alcohol induced rage and shot a hole in the floor.
>
> The appellant reported the April 3rd incident to the police on the night of its occurrence. Corporal M. J. Anderson of the Savannah Police Department was the investigating officer, and he testified at the initial trial that when he arrived at the scene, although he found a bullet hole in the floor underneath the carpet in the room in which the appellant stated the shooting occurred, he could not determine whether it " 'was a new type of gunshot or was an old one.' " 250 Ga. at 464. In closing argument, the prosecutor

contended that the incident was thus contrived as a prelude to the eventual murder of the victim one month thence.

In the early morning hours of May 2, 1981, the Savannah Police Department received another telephone call from the appellant, in which he stated that he had been involved in a shooting and that the police should be sent.

Corporal Anderson, again the investigating police officer, arrived at the appellant's house within minutes after the call was received. He testified that he found the victim lying face down with his right hand above his head and a pistol under his hand; the victim had no discernible pulse and was not breathing. He had been shot once in the chest, once in the back, and once in the head.

The appellant's trial testimony was that the victim had shot at him when he, the appellant, was seated behind his desk, and, in self-defense, the appellant then fired three quick shots into the deceased.

As stated in *Williams I* [250 Ga. 463, 298 S.E.2d 492], the state's contention at trial was that the appellant "shot the victim with one gun which he placed on his desk, then shot at his desk and chair with a second gun, pulled the victim's right hand from under his body and placed the second gun under the victim's hand. Id."

Circumstantial evidence consistent with this hypothesis included testimony by the police that the blood found on the victim's right wrist and hand, as well as the blood found on the gun used by him, had been smeared thereon. And, there was no blood found on the floor in the vicinity of the victim's right hand, although blood was found on the floor underneath the victim. In addition, bullet holes in the floor corresponded

> to gunshot wounds to the victim's back and head when the victim's head was placed in a position facing to the right; as the corpse was found by the police, the victim's head was facing to the left. Further, the leg of a chair sitting upright was on the victim's pant leg, the pistol used by the appellant was found on the appellant's desk, and paper fragments were found on top of this pistol. Finally, tests of the victim's right hand showed no gunpowder residue.

*Williams v. State*, 258 Ga. at 306-07.

Further facts will be developed as necessary herein to more fully explain the Respondent's position.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT PETITIONER'S RETRIAL WOULD NOT BE BARRED BY THE DOUBLE JEOPARDY CLAUSE.

The Petitioner first argues in his petition for a writ of certiorari that the Supreme Court of Georgia erred in its determination that no violation of the Double Jeopardy Clause would occur when the Petitioner was retried on the Chatham County, Georgia, murder charge. However, a review of the opinion in queston shows that the Supreme Court of Georgia correctly determined that the Petitioner's retrial would not be barred and therefore this allegation by the Petitioner presents no basis for the granting of a writ of certiorari.

The basic factual premise upon which the Petitioner's Double Jeopardy claim rests is the Petitioner's

allegations that prosecutorial misconduct in his case has previously denied him a fair trial, and therefore the prosecutor should not be permitted another attempt to convict the Petitioner. Specifically, the Petitioner maintains that prosecutorial misconduct occurred during his first trial when, as the Supreme Court of Georgia noted in the Petitioner's first direct appeal, impeaching evidence in the form of a police report was not provided to the Petitioner at trial. *See Williams v. State*, 250 Ga. at 464-66. The Petitioner also alleges that prosecutorial misconduct occurred in his second case when a police officer was permitted to testify as an expert witness, and the Supreme Court of Georgia later determined that this "expert status" was improperly invoked at trial. *See Williams v. State*, 254 Ga. at 510-11(2). Additionally, in the Petitioner's second case the Supreme Court of Georgia held that a portion of the prosecutor's argument demonstrating the trigger-pull on the Petitioner's weapon was improper under Georgia law. *Id.* at 511(3). In relation to his third trial, the Petitioner alleges that prosecutorial misconduct arose when he was not provided with a hospital emergency-room admitting sheet which contained information regarding when the victim's hands had been "bagged" to preserve any evidence of gunpowder residue. *Williams v. State*, 258 Ga. at 309-10. Finally, the Petitioner alleges that the prosecutor's comments to reporters after the Petitioner's third trial ended in a mistrial also amount to such prosecutorial misconduct as to warrant the barring of any further trials of the Petitioner.

The Supreme Court of Georgia extensively reviewed each of these factual claims by the Petitioner, many of which were based upon the prior decisions of the

Supreme Court of Georgia in the Petitioner's case, and rejected each of the Petitioner's claims of prosecutorial misconduct as justifing the barring of a retrial.

Regarding the failure to provide impeaching evidence in the Petitioner's first trial, which the Supreme Court of Georgia determined then to have been a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court of Georgia noted that, "[I]t is clear that no intentional 'corruption of the truth-seeking function of the trial process' by the prosecutor has been established here." *Williams v. State*, 258 Ga. at 308. Instead, what happened was that the prosecutor did not remember that testimony given at the first trial was inconsistent with the police officer's report in question and therefore the prosecutor had not intentionally misstated any of the evidence in the case. *Id.* The Supreme Court of Georgia noted that this explanation by the prosecutor, "finds corroboration in the fact that the trial judge, who conducted an in-camera inspection of the incident report, apparently also failed to recall the inconsistency." *Id.*

Regarding the Petitioner's allegations that prosecutorial misconduct arose when a police officer was improperly permitted to testify as an expert witness at his second trial and that the prosecutor argued improperly at the second trial, the Supreme Court of Georgia rejected those claims as demonstrating any deliberate prosecutorial misconduct in this case. *Williams v. State*, 258 Ga. at 308-09, 311-12. Instead, the Supreme Court of Georgia characterized those two issues as "trial error" and not prosecutorial misconduct. *Id.* at 311-12.

As to the Petitioner's claims of prosecutorial misconduct arising from a failure to provide an emergency-room form to the defense, the Supreme Court of Georgia factually determined that this document had not been a part of the prosecutor's file. *Id.* at 312. As such, the prosecutor was not chargeable with knowledge of this document and his failure to produce such an unknown document could not amount to prosecutorial misconduct. *Id.* Additionally, the Supreme Court of Georgia noted that:

> [T]he defense raised no objection to the omission of this form until a subpoena issued by the defense during the course of the third trial produced the information. And, at the third trial the appellant utilized this newly discovered information in his defense, and he did not request a mistrial or a continuance in order to obtain additional time for investigation.

*Id.* at 312.

As to the Petitioner's final factual claim that his retrial should be barred because of comments made by the prosecutor to the press, the Supreme Court of Georgia also properly rejected that claim. *Williams v. State*, 258 Ga. at 313-15(2). The Supreme Court of Georgia summarized the comments in question as follows:

> Referring to the history of this case, the prosecutor stated, "So far as I see it, the score is 35-to-1 for conviction, and I'm confident that if we bring it back and get a jury that is willing and able to decide, then we'll get the right result." He further stated, "Two juries have voted unanimously for conviction. Another has voted 11-to-1 for conviction. In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged.

*Id.* at 310. The prosecutor later argued that these statements were given as an explanation as to the legitimacy of reprosecution of the Petitioner based upon the three trials which have been conducted and the overwhelming votes of the jurors in favor of conviction. *Id.* at 314. While the Supreme Court of Georgia noted that the prosecutor's comment concerning the "right result" could be considered an impermissible expression by the prosecutor of his opinion concerning the merits of his case, that court also made no finding that this was a deliberate prosecutorial misconduct in order to prejudice the Petitioner's chances for retrial.

The Supreme Court of Georgia rejected the Petitioner's claims that these factual allegations outlined above amounted to deliberate prosecutorial misconduct. Additionally, the Supreme Court of Georgia properly rejected the Petitioner's legal premise that these factual allegations would support a claim that his retrial should be barred under the Double Jeopardy Clause. "[I]t is a quantum leap from a conclusion that the reversal of a criminal conviction is necessary, to a holding that, as a result of the error or errors upon which the reversal is predicated, the Double Jeopardy Clause erects a constitutional barrier to further prosecution of the defendant." *Williams v. State*, 258 Ga. at 311.

The Supreme Court of Georgia had determined on the Petitioner's second direct appeal that the evidence presented against him was sufficient to support his conviction pursuant to the standards of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Williams v. State*, 254 Ga. at 509-10(1). As such, there is no evidentiary bar to the Petitioner's

retrial. *Burks v. United States*, 437 U.S. 1, 11 (1978). Additionally, the fact that the Petitioner's third trial ended in a mistrial when the jury was unable to reach a unanimous verdict also does not prevent the Petitioner's retrial. *Arizona v. Washington*, 434 U.S. 497, 509 (1978).

As this Court has noted, and as implicitly recognized by the Supreme Court of Georgia in this case *sub judice*, while the Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense, it does not offer a guarantee to a defendant that the state will vindicate its societal interest in the enforcement of criminal laws in only one proceeding. *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982). This is so because otherwise, "the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Id.* Additionally, this Court has noted that:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on a defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

*Kennedy* at 675-76.

As demonstrated by the extensive opinion of the Supreme Court of Georgia below, there was no prosecutorial conduct intended in this case to subvert the protections afforded by the Double Jeopardy Clause. There has in fact been no showing of prosecutorial misconduct or overreaching in this case so as to impose upon

the prosecution and society an absolute bar to prosecution of the Petitioner for this crime. Instead, the determination of each of the Petitioner's prior cases does not act in any way to invoke the Double Jeopardy Clause so as to prevent the Petitioner's retrial. Accordingly, the Supreme Court of Georgia correctly determined that the Petitioner's allegations to the contrary are without merit. Therefore, this allegation by the Petitioner presents no basis for the granting of a writ of certiorari by this Court.

## B. NO FEDERAL QUESTION IS PRESENTED FOR REVIEW REGARDING PETITIONER'S CLAIM OF DISQUALIFICATION OF THE PROSECUTOR.

As the second and final allegation of his petition for a writ of certiorari, the Petitioner alleges that the Supreme Court of Georgia improperly affirmed the decision of the trial court denying the Petitioner's motion to disqualify the prosecutor at Petitioner's retrial. While the Supreme Court of Georgia did affirm this decision by the trial court, a review of the decision in question shows that it is not based upon a determination of federal constitutional principles and therefore no federal question is presented for review by this Court.

In discussing the Petitioner's claims of disqualification, the Supreme Court of Georgia discussed the Petitioner's allegations in relation to the rules and regulations of the State Bar of Georgia and in relation to Georgia law. *Williams v. State*, 258 Ga. at 313-15(2). The Petitioner's claim presented in this petition for a writ of certiorari regarding his rights to due process and equal protection of the law in relation to being tried in the venue where his crime was committed is not addressed in

the opinion of the court below. This Court has consistently adhered to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state law ground, even though a federal question may be involved or even perhaps wrongly decided. *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935). In explanation of this policy, this Court has said:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

*Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977).

As a review of the opinion of the Supreme Court of Georgia demonstrates that no federal issue was decided by that court, Respondent submits that this issue presents no basis for the granting of a writ of certiorari.

## CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

DENNIS R. DUNN 234098
Assistant Attorney General
*Counsel of Record*
*for the Respondent*

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

Please Serve:

DENNIS R. DUNN
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499